

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

<i>In the Matter of B.B.,</i>)	
<i>Duneland School Corporation,</i>)	
<i>And the Porter Co. Education Interlocal</i>)	Article 7 Hearing No. 1335.03
)	
Appeal from the Decision of)	
Dennis D. Graft, Esq.,)	
Independent Hearing Officer)	

Procedural History and Background

The Parent requested a due process hearing on February 27, 2003, to resolve disputes with the Duneland School Corporation and the Porter County Educational Interlocal (hereinafter, collectively referred to as the “School”).¹ On February 28, 2003, Dennis D. Graft, Esq., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

The IHO sent the parties on March 5, 2003, a Notice of Pre-Hearing Conference, set for March 14, 2003. Counsel for the Student notified the IHO of her involvement and requested a continuance of the pre-hearing. The IHO granted the request on March 12, 2003, and re-set the pre-hearing conference for April 3, 2003. On March 25, 2003, counsel for the School sought the issuance of certain subpoenas. The IHO ordered reserved discussion of this matter for the pre-hearing conference.

A pre-hearing conference was conducted by telephone on April 3, 2003. Pursuant to I.C. 4-21.5-3-19, the IHO issued a Pre-Hearing Order that same date, identifying seven (7) “possible issues” but indicating that there may be more. Counsel were ordered to confer and specify the issues in controversy, and inform the IHO of the specific issues within fourteen (14) days. Hearing dates were established, along with a specific date and time by which the parties must exchange exhibit and witness lists. At the Parent’s request, the hearing was closed to the public and witnesses were to be separated. The School’s Motion to Evaluate the Student was granted.

¹ Although the request was made on or about February 8, 2003, it was not clear what the Parent was requesting. The letter appeared to request mediation, but the mediation request was not completed. The Division of Exceptional Learners, Indiana Department of Education, sought clarification from the Parent as to her intentions. The Parent clarified on February 27, 2003, that she sought a due process hearing. The Parent, in her Petition for Review, seems to object to the IHO’s characterization of her hearing request as unclear. The record indicates unequivocally that her request was unclear and required clarification. This is not a substantive issue that requires any further discussion.

The Student, by counsel, requested on April 15, 2003, that the IHO grant an extension of the time line for specifying issues. The IHO granted the request and ordered counsel to specify issues by April 25, 2003. By Order dated May 7, 2003, the IHO acknowledged receipt of the issues.²

The IHO issued an "Additional Pre-Hearing Order" on May 16, 2003, denying the Student's request for a continuance of the hearing date and noting the School's affirmative defense that the statute of limitations may apply to some of the issues raised by the Parent and Student.

On May 19, 2003, the IHO conducted a final pre-hearing conference. Objections to proffered documents were noted and the issues were placed in the record. The hearing commenced on that date and continued on May 20, May 21, and May 30. In a written entry dated May 20, 2003, the IHO set June 30 and July 1 as additional hearing dates, should these be required.

The School, by substitute counsel, moved on June 20, 2003, for a continuance of the June 30 and July 1 hearing dates due to the illness of the School's original counsel. The IHO granted the request and set August 14, 2003, for the additional day of testimony. The Student, on July 12, 2003, requested a continuance of the August 14, 2003, hearing date, which the IHO granted on July 23, 2003. By agreement of the parties, September 18, 2003, was established as the hearing date, with the final written decision due on October 6, 2003.

The final day of hearing was conducted on September 18, 2003. On September 19, 2003, in a written entry and order, the IHO set time lines for the parties to submit written closing arguments and briefs as well as to submit tape recordings from a case conference committee conducted in October of 2002.

The IHO issued his written decision on October 6, 2003. The following issues were delineated for the hearing.

1. Did the School fail to provide a free appropriate public education (FAPE) to the Student in the least restrictive environment and failed to devise an appropriate IEP for the child, including the following:
 - a. Since February, 1997 did the School fail to timely and accurately identify the child as a special needs student and timely and accurately identify his areas of special needs, specifically Learning Disabled (LD) and Other Health Impaired (OHI), in violation of Article 7 Rule 25 and Rule 26?
 - b. Since January, 1998 did the School fail to devise appropriate and measurable goals and objectives, in violation of Article 7 Rule 27?

² Some of the documents styled by the IHO as "Orders" are actually Entries. For the purpose of this section, however, the IHO's choice of style will be employed.

- c. Since January, 1998 did the school fail to provide education and services to the child because of budgetary or staffing problems, not based on the child's individual needs, in violation of Article 7 Rule 27?
 - d. Since February, 1998 did the school repeatedly ignore the recommendations of the parents and their experts (specifically three named doctors) as to the educational and related needs of their child, in violation of Article 7 Rule 27?
 - e. Did the School fail to provide extended school year (ESY) services for the child for the summers of 1998 through 2002, despite the parents' repeated requests in an effort to prevent regression, and also fail to offer speech therapy, occupational therapy and physical therapy since 1998, in violation of Article 7 Rules 17, 21, 27, and 28?
 - f. Since January, 1998 did the School fail to provide a timely and appropriate functional behavioral assessment (FBA) and fail to implement a behavioral intervention plan (BIP) but instead punish the child for actions and inactions that were manifestations of the child's disabilities, resulting in harm to the child, in violation of Article 7 Rules 17 and 29?
 - g. Since January, 1998, when the child missed a lot of school, did the School fail to devise a plan for the child to do make up work or otherwise continue receiving educational benefit despite his absences, in violation of Article 7 Rule 27?
 - h. In 1998, did the School fail to arrange a case conference committee meeting at a time and place that was mutually agreeable and fail to convene case conference committee meetings when requested by the parents in October of 2001 and of 2002, in violation of Article 7 Rule 27?
2. Did the School fail to follow the provisions of the child's IEPs since January, 1998 in violation of Article 7 Rule 27?
 3. Since January, 1998, were the teachers, staff and administrators and parents adequately trained in the areas of the child's needs and disabilities, in violation of Article 7, Rules 20 and 28?
 4. Since January, 1998 did the School fail to conduct needed evaluations to determine whether the Student was LD or OHI and as a result the parents sought out the evaluations needed, have not been reimbursed for those and request that reimbursement be ordered in violation of Article 7 Rule 25?
 5. Did the School fail to share records within 45 days of the request by the parents during the 2000-2001 school year?

6. In the Fall, 2002, was the child's placement altered without the reconvening of the case conference committee, in violation of Article 7, Rules 17, 22, 27 and 29?
7. Is the Student entitled to compensatory education due to the alleged violations?

The IHO's Written Decision

Based on the evidence and testimony of record, the IHO determined fifty-two (52) relevant Findings of Fact.³

1. The Student is twelve (12) years old who was a 5th grade student at a public school during the 2002-2003 school year and is presently being home schooled.
2. The Student had a developmental assessment in May, 1993 when he was two years old. The student was found to be at or near age level in all developmental areas but for language. Further, the Student's verbal skills were limited but emerging. It was recommended that the Student enroll in an Early Intervention (EI) Program to address speech and language delays, have a speech language evaluation, participate in a Toddlers' Group activities with peers to stimulate language, and have home visits by and EI specialist. The Student had a speech language evaluation. Due to the Student's moderate delay in expressive language, it was recommended he attend the Toddlers' Group and EI, receive direct interaction with a speech pathologist/aide, and the parents receive instruction in indirect language facilitation techniques.
3. On July 21, 1993, an Individualized Family Service Plan (IFSP) was developed for the Student. The IFSP noted a priority of increasing the Student's expressive language and included speech therapy once per week for 30 minutes to train the parents, an EI specialist was to work with the parents in their home two times per month for one hour, Toddlers' Group sessions of two times per week for peer interaction with a speech pathologist present, and speech instruction of two times per week for 1 ½ hours.
4. On December 3, 1993, the Toddlers' Group sessions and speech pathologist therapy were discontinued since the Student was at age level in speech. The home visits were reduced to once every three months for 60 minutes.
5. In January, 1994 an EI specialist evaluated the Student and determined the Student was within age-appropriate range in language, cognitive, social/emotional, fine motor, gross motor and self help. Further, there was a referral to the special education pre-school for screening, since the child was transitioning from EI.

³ The restatement of the IHO's Findings of Fact, Conclusions of Law, and Orders have been edited for format purposes.

6. On May 6, 1994, a pre-school child-find screening was held. The Student was determined to be age-appropriate in motor skills, concepts, and language and speech. It was noted the student had behavior problems at home.
7. The Student attended a private kindergarten for the first semester of the 1996-1997 school year and then enrolled in the local educational agency (LEA) on February 18, 1997. In March, 1997 the Student was referred to the General Education Intervention team (GEI) due to his attendance problems. A case conference was held in June, 1997. It was noted that the Student had inconsistent attendance, having missed 21 out of 72.5 days. Further, it was noted that the Student needed to develop readiness skills to be ready for the first grade, his math skills were weak, and he had difficulty independently entering the class. The LEA recommended he attend kindergarten again the following year.
8. From August 26, 1997, to September 11, 1997, the Student attended a private first grade. The Student's mother believed the Student was ready for the first grade, rather than repeat kindergarten, as the LEA proposed. However, the private school was unable to handle the Student's behavior problems.
9. On September 12, 1997, the Student enrolled in kindergarten at the LEA in the P.M. class with the Student's progress to be evaluated to determine if he might progress to a split-day program of kindergarten and 1st grade.
10. On November 19, 1997, a review meeting of the GEI team was held. The Student's explosive behavior was negatively impacting the student academically and socially. The Student's GEI included isolation, group separation, firm and explicit directions, and one-day suspension. It was noted that the GEI had only temporary results and that the student appeared to use inappropriate behaviors so he could be at home.
11. On November 5, 1997, the Student had a speech evaluation. A case conference committee, on November 18, 1997, determined that the Student did not meet the criteria to be eligible for special education services under Communication Disorder nor under other areas of disability. The Student's mother received verbal and written explanations of her rights and agreed with this recommendation.
12. In November of 1997, the Student had behavior problems. He was suspended for one day after those behaviors.
13. On December 1, 1997, the Student misbehaved (overturned tables, grabbed items, and was kicking others) and was suspended for five days starting December 2, 1997. Later on December 1, 1997, the Student was hospitalized, where he remained until December 9, 1997.
14. On December 11, 1997, the mother met with school personnel and agreed to have the Student evaluated for eligibility for special education services.

15. On January 5, 1998, the Student's behaviors escalated, with him turning over tables and chairs, kicking another student, spitting in the school nurse's face, and he had to be restrained. He was suspended for five days through January 13, 1998. On January 7, 1998, it was requested that the Student receive homebound instruction starting January 13, 1998, through January 30, 1998, pending the completion of the evaluation.
16. A case conference was held on January 29, 1998. The school psychologist found that on the Weschler Intelligence Scale for Children the student had a verbal IQ of 90, a performance IQ of 87, a full scale IQ of 92, and a Learning Expectancy of 92. The student tested low in picture completion, similarities, and arithmetic. In Behavior Rating Scales, the student showed oppositional behavior, social problems, dependency, emotional lability, ego strength weakness, poor attention and impulsivity, excessive resistance, and poor social conformity. The Student's social and emotional development noted that the Student quickly escalated to the point of the need to be restrained, had destructive behaviors, showed no remorse and wants to be at home. The school psychologist believed the student needed a very structured behavior plan, viewed the student as emotionally handicapped under 511 IAC 7-17 *et seq.* ("Article 7"), and suggested the student be in a self-contained environment. In the test of Early Reading Ability, the Student scored in the borderline to low average range, with weak reading skills and math in the low average range. In the case conference committee meeting it was noted that the Student was under the care of a psychiatrist and on medication and in out-patient therapy. The Student was deemed eligible for special education services as emotionally handicapped. The Student's goals and objectives were developed to address the behavioral problems. It was recommended that for the balance of kindergarten, the Student be placed 100% of his school time receiving special education services and for the 1st semester of first grade he received special education services 93% of his school day. The Student's mother agreed to the Student's IEP for the period of January 29, 1998, through January 28, 1999. The mother received a copy of the notice of her procedural rights and agreed to this IEP. The Student was placed in a kindergarten EH class, not at his home school, but at another school in the local school district with a self-contained EH kindergarten class, which the Student needed. This placement was due to this was the site of the LEA's self-contained EH class. There was an inadequate number of students in the Student's home school to have such a program at his home school. For the LEA to have educated the Student at his home school, it would have been one-on-one with a teacher and no interaction with other students.
17. The Student performed adequately during the remainder of his kindergarten year with some, but no serious behavioral problems. Once the Student was aware there were limits on behaviors, he progressed behaviorally and academically. The Student attended summer school but did not receive extended school year (ESY) instruction or services.
18. During the first semester of the Student's first grade (1998-1999 school year), the Student continued to perform adequately with minor behavioral problems. The Student missed 11 ½ days of school during this semester.

19. On January 28, 1999, the Student's annual case review was held. The Student was primarily in an EH class for his classes, but there was some inclusion for science, social studies, health, art, music and P.E. The Student was determined to not need ESY, since by October 31, 1998, he had regained all past levels from the prior year. The Student was making progress in his academic, social, emotional and adaptive behaviors. The Student's mother agreed that the Student did not need any additional evaluations but did submit a one-page summary of results of a Weschler Intelligence Scale for Children 3rd Edition, in which the student scored a verbal IQ of 97, performance IQ of 104, and a full scale IQ of 100.

A generic behavior management plan (BMP) used in the EH classes for the students was proposed with a token system for the Student's academic performance and behavior using a scoring of his performance and behavior during each class period. Further, the BMP included a Levels system (the student to start at level 1 and, based on behaviors over a period of time, progressing to level 5. Level 1 was very structured, whereas level 5 allowed more freedoms). The Student's various teachers maintained daily behavior point sheets, which the Student's Teacher of Record (TOR) compiled and graphed to establish the Student's behaviors, similar to a functional behavior assessment.

The Student's goals and objectives were in the area of interpersonal relationships, which individualized the BMP to meet the Student's specific needs. The Student was then in a special education math class with the plan being based upon his performance: If he continued his progress, he would be placed in a regular education math class beginning the 4th 9 weeks. The Student was in a special education class for language arts and reading. In this reading class the Student was receiving instruction from the Stephenson program (phonetic-based program). Also, the Student was in affective group for special education students. The Student's mother agreed with the student's IEP and received the LEA's advisement of rights and procedures.

20. During the 1st 9 weeks of the second grade (1999-2000), the Student missed only two days and was performing adequately.
21. During the 2nd 9 weeks the Student's behavioral problems started to increase. Due to his behaviors, he was "level busted" on two occasions. Further, the Student missed 12 days of school.
22. In January, 2000, the LEA sent notice to the parents, scheduling the Student's case conference for January 19, 2000. However, this case conference was rescheduled at the request of the parents. The LEA then scheduled the case conference for February 3, 2000, but the Student's mother requested the conference be rescheduled, which it was to February 4, 2000. The then-current IEP lapsed on January 29, 2000.
23. At this February 4, 2000, case conference, the Student continued to be eligible for special education services under the emotionally handicap category. The Student was

enrolled in an EH classroom for language arts and affective group. He was in the regular 2nd grade for all other classes. The case conference committee deemed ESY services were not needed since the Student had regained the prior year's levels by October 31, 1999.

It was noted that the Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and was currently prescribed Aderal.

The Student's IEP included goals and objectives for four areas:

- (1) Intra/Inter-personal relationships;
- (2) On-Task/work skills;
- (3) Reading;
- (4) Language arts/spelling

The Student's IEP continued the implementation of the Behavior Management Plan with the goals and objectives in the four areas individualizing the BMP. The Student's mother agreed to the Student's proposed IEP and was advised of her procedural rights.

24. This IEP developed on February 4, 2000, was implemented and the Student made steady, but not extraordinary, progress academically and behaviorally. During the 1st semester of the Student's 3rd grade, he missed 21.5 days of school, due to various medical and non-medical reasons.
25. On October 10, 2000, the Student took the Indiana Statewide Testing for Educational Progress (ISTEP) test. In math he scored 522 and in English/Language he scored 524. The cut scores (score required to show competency) were 479 for math and 475 for English/Language.
26. The student's annual case review was held on February 2, 2001. Prior to this case conference the Student was evaluated by the school psychologist. On the Wechsler Intelligence test the Student had a verbal IQ of 93, a performance IQ of 96, a full scale IQ of 96, and a Learning Expectancy of 96. The Student was also administered the Wechsler Individual Achievement Test (WIAT). The Student had borderline achievement in basic reading, reading comprehension, and spelling, and low average achievement in Math Reasoning, Numerical Operations, and Written Expression. On the Burk's Behavior Rating Scale completed by his TOR and a regular 3rd grade teacher, it was noted that the Student was excessively withdrawn, excessively dependent, had poor ego strength, poor academics, poor attention, excessive resistance, poor social conformity, and numerous absences. The Student remained eligible for special education services as emotionally handicapped. His program included placement in the Emotionally Disabled (ED) class for language arts and Affective Group, with all other classes in regular education. It was noted that the Student was making slow progress in language arts and spelling, using a phonics-based program. However, due to his numerous absences, he missed presentations of phonics rules and had difficulty catching up. The Student was maintaining a level 5 in the levels part of the BMP. The Student continued to need redirection and had

silly-type behavior in the less-structured settings. The BMP continued to be implemented, again, individualized by the Student's goals and objectives.

The parent's advocate questioned why the Student was not determined to be Learning Disabled. The case conference committee believed the Student's emotional handicap was the cause for the Student's academic problems, not a learning disability. The Student's goals and objectives were in the same four areas as the prior IEP. The Student was deemed not eligible for ESY services since he had regained all past levels of performance of the prior year by October 15, 2000. The Student's mother was advised of her rights and received a copy of the Procedural Rights Handbook. On March 2, 2001, the Student's mother agreed to this IEP.

27. After the February 2, 2001, case conference committee meeting, through March 20, 2001, the Student had attended school regularly and was performing acceptably.
28. On March 21, 2001, the Student's behavior deteriorated and he was "level busted" on two occasions.
29. During the start of the Student's fourth grade, the Student's behavior problems escalated. He was "level busted" on two occasions from level 5 to 4, which was not a change in placement. The TOR was seeing new and different behaviors, such as being more defiant, more uncooperative, and more outspoken. At the beginning of the school year, the Student was in regular education classes for all classes but for language arts (reading), spelling, and Affective Group. The Student had been taken off his ADHD medication since November, 2001 by his physician.
30. On February 1, 2002, the Student's annual case conference was held. The Student was placed in all special education classes, but for his specials (art, music, and gym). The Student had not regained skills to the level he was at during the end of the prior school year. This was due to outside influences (absences), and the committee did not believe that ESY services would benefit the Student. The Student had been "level busted" all the way down to level one, which required him to be in all special education classes. Since the February 1, 2002, case conference was already scheduled, this change in placement was addressed at this case conference. The Student had been more inattentive and less focused. The Student's TOR was giving more individual one-on-one instruction and small group instruction.

The Student was using a 3rd grade level phonics-based reading program and making very slow progress. In language arts/spelling the Student was doing fair in grammar lessons but was unable to transfer this to his daily work. The Student had been doing better in math since placed in a special education class due to his improved behavior. The Student's attendance had improved. The Student's mother agreed that no additional testing was needed.

The Student continued as eligible for special education services as an ED student with the same four areas of his goals. Further, the prior BMP continued to be used, since it seemed successful in the special education classes. The Student continued in all

special education classes but for his specials. The Student's mother was advised of her procedural rights and she agreed to the Student's IEP.

31. For the 5th grade the Student was placed at an intermediate school with an ED classroom. The Student's TOR and teacher of services for a number of the Student's classes had two full-time aides, one of whom would accompany the Student and other students to his general classes.
32. In late September, 2002 during the Student's 5th grade year, the Student's behavior deteriorated with disruptions in his music class and in language arts and reading. The Student was changed from one special education math class to another special education class to better meet his academic level.
33. Based upon the Student's behavioral problems, a case conference was convened on October 3, 2002. The Student was placed with his TOR for all special education classes, and the Student was to be reintroduced to various other special education teachers if his behavior improved. The Student was returned to his previous special education teacher of service for reading and language arts in late October, 2002.

A functional behavior assessment (FBA) was done and a Behavior Intervention Plan (BIP) was developed to try to address the Student's escalating behaviors. It was reported that the Student had started private counseling, The Student's IEP and BIP were to be reviewed on November 8, 2002, at the Student's parent/teacher conference. However, the Student's mother canceled this meeting on November 6, 2002.

34. On November 21, 2002, there was a case management services referral of the Student to the local mental health organization.
35. On January 29, 2003 the Student's annual case conference was held. The Student's present levels of performance were as follows:
 - (a) Math--in special education class with a curriculum which parallels the general education curriculum the Student was close to grade level with a grade of B.
 - (b) Language arts/spelling--with direct special education services the Student had a B+ in language arts and a D- in spelling. The Student's spelling was poor.
 - (c) Reading--also with direct special education services the Student was receiving a B+ but he was behind grade level. The Wilson reading program was being used with the Student.
 - (d) Science--with direct special education he was receiving an A, but his reading level was hindering the Student.
 - (e) Social Studies--with direct special education services but with a curriculum that parallels the general education class, he was receiving an A, but again, his reading level was hindering him.
 - (f) Specials--in general education class he was doing well in Art and P.E. with current grades of B and A respectively. He was not in music due to his prior behaviors in September, 2002.

The Student's conduct appeared to depend upon whether he liked the class and/or the teacher. If he did not like the class or the teacher, behavior problems occurred.

The Student continued to be determined eligible for special education services as an EH student. The Student's behavior problems were impeding his learning as well as the numerous absences.

During the first eight weeks the Student had academically and behaviorally obtained the levels at the end of the prior school year and ESY services were deemed unnecessary.

The Student's mother requested testing to determine whether he was learning disabled.

The Student's proposed IEP required direct education services in all classes but for his specials. The Student's areas for goals and benchmarks were:

- (a) Written language;
- (b) reading;
- (c) social skills; and
- (d) on task/work skills

On two of the Student's goals, the short-term objective mastery levels were not indicated, whereas on the two remaining goals, the short-term objectives required 80% mastery. The TOR indicated that the mastery levels for the first two goals were intended to also be 80% but were inadvertently omitted. The behavior intervention plan (BIP) from October 3, 2002, was to remain in effect.

The Student's performance and behavior had improved since the October 3, 2002, case conference and the implementation of the new BIP.

The mother presented a March, 2002 medical report finding that the student had myoclonic jerks but did not diagnose the student with Tourette's Syndrome. The mother was to obtain a more current medical report. The mother also presented a psychological evaluation in 1997 with a diagnosis of ADHD and ODD. The Student's mother wanted the student to have an aide, although there was one with him at all times, but not a one-on-one aide. The mother did not agree with the proposed IEP.

- 36. The Student's poor behavior and absences increased, with him declining academically after the January 23, 2003, case conference.
- 37. The Student last attended the LEA on March 5, 2003, and was withdrawn by the mother to home school him, which has continued through the present time.
- 38. On February 8, 2003, the mother sent a letter to the Indiana Department of Education. The letter was unclear if the request was for the appointment of a hearing officer for a

due process hearing or if she desired mediation. Through communications between the mother and the Indiana Department of Education, it was determined that the mother desired a due process hearing. This Hearing Officer was duly appointed to this case on February 28, 2003.

39. On April 3, 2003, during the first pre-hearing conference, at the request of the LEA, this Hearing Officer ordered evaluations of the Student. Although the mother had previously requested such testing and had consented in writing, she subsequently withdrew her consent.
40. Subsequent to the Student's testing, which was done in April, 2003, the LEA obtained, upon the mother's release, various medical and psychological reports, which had previously been privately obtained by the Student's parents. Many of these reports had not previously been supplied to the LEA.
41. The LEA's April 2003 evaluations of the Student were as follows:
 - a. Wechsler Intelligence: verbal IQ-92; performance IQ-99; full scale IQ-95. In sub-tests the Student was below average in Coding and Digit Span.
 - b. Adaptive Behavior Evaluation: The student was below average.
 - c. Wechsler Individual Achievement Test: the Student was below expectancy range in word reading, reading comprehension, pseudo-word decoding, spelling and written expression. The Student was within his expectancy range in numerical operations, listening comprehension and oral expression.
 - d. Woodcock-Johnson: Reading--below average range with a significant discrepancy from his expectancy; Math-average range of achievement with no significant discrepancy from his expected score; written expression-significant discrepancy from expectancy; and spelling-below expectancy;
 - e. Behavior Rating Scales: The Student had significant areas below the average student.
 - f. Physical Therapy--within normal range.
 - g. Occupational therapy--within normal range.
 - h. Speech therapy--within normal range.
42. The Student had a neuro-psychological evaluation on June 25, 2002. The evaluator found a pattern of significant weakness in graphomotor speed and accuracy difficulty in situations requiring selective or focused attention. He had intact language skills but for his relative weakness in phonological processing. This may negatively impact upon the acquisition of reading and spelling skills, and may combine with the difficulties in graphomotor precision to result in poor writing skills as well as the presence of significant emotional/behavioral features that could significantly hinder adaptive behavioral functioning. Recommendations included:
 - (1) Continued medical follow up and review with regard to appropriateness of medications.

- (2) Referral for individual and family therapy services to aid both the student and his family in addressing both ADHD and behavioral/emotional issues, as well as current family conflicts.
 - (3) Although of average cognitive/intellectual ability, difficulty with cognitive fluency and efficiency, as well as attention capacity, would appear such as to necessitate some accommodations within the traditional classroom setting, i.e. extended time limits, increased use of external structuring devices/techniques, and the like.
 - (4) With regard to new learning, most efficient mastery of new learning might be best accomplished using techniques such as chunking, outlining, and the like.
 - (5) In light of behavioral observations, consideration might be given to comprehensive audiometric evaluation to rule out hearing impairment, although current data would suggest that hearing does appear intact.
43. The Student had a neurological evaluation on February 6, 2003. The neurologist met with the Student and his mother for background information. A local learning center evaluation was reviewed by the doctor, but he did not review any of the LEA's past evaluations or the student's IEP. The doctor noted three areas of concerns:
- (1) Tics
 - (2) Reading problems
 - (3) Attention problems

The doctor prescribed medications for the tics. The doctor, based solely upon the Student's scores on the local learning center test results and the interview, without any individualized multi-factored testing for learning capacity, opined that the Student had a learning disability, since he was in the sixth grade but reading at only the 1st or 2nd grade level. Further, he opined that this was not an emotional disability since the Student was at the sixth grade level in math. The doctor recommended that the Student have individualized instruction in reading using the Wilson or Orton-Gillingham reading programs. The doctor was not aware of any specialized reading programs the Student had been in.

The doctor also opined that the Student did not need special therapy nor have a chronic illness since the Student's absences were for numerous reasons.

44. During the various years, whenever the Student was absent from school, the Student's teacher of record (and primary teacher of service) went over the missed instruction, spending more one-on-one time with the Student. Missed homework assignments were either completed in class or in the Student's open period in his schedule (resource time).
45. The LEA has used specialized reading programs for the Student, such as Wilson or Stephenson Reading Programs and Saxon Phonics. Further, the LEA implemented

the recommendations of the parent's experts for such specialized reading programs and "chunking."

46. The Student's TOR and primary special education teacher of service for kindergarten through his 4th grade year was certified in teaching learning disabled students. Clearly, the Student had difficulties in reading, but this teacher used many of the same approaches in terms of teaching techniques, strategies and materials for the Student (although having an EH eligibility classification) as she did with students who were classified as LD. She used teaching techniques such as chunking and outlining and used a multi-sensory teaching approach.
47. The LEA offered various educational and training programs for parents, including one instructed by one of the school's teachers for EH students. There was also an ADHD workshop offered to parents numerous times each year. The school also offered a program instructed by an expert in behavior assessment in the Spring and Summer of 2001. Flyers of such programs were sent home to the parents of children in special education classes.
48. The LEA provided various in-service training programs for its staff in the area of the Student's disability.
49. The Student's teachers of record and primary special education instructors informally tested the Student each fall (by October 31) to determine whether the student had regressed over the summer, beyond the average student, by comparing his levels at the end of the prior school year with his then-present levels.
50. The Student was absent from school for 217 days for various reasons during his academic career while enrolled at the LEA.
51. The Student's teachers did not see the need for individual counseling for the Student for him to benefit from his special education programs, especially since he was in the affective education class from K through 5th grade.
52. During the May 16, 2003, pre-hearing conference, the LEA raised a two-year statute of limitations defense to all matters prior to February 8, 2001, since the mother initiated this due process matter on February 8, 2001.

Based on the foregoing 52 Findings of Fact, the IHO made the following twenty-seven (27) Conclusions of Law.

1. Neither the Individuals With Disabilities Education Act (IDEA) nor Article 7 contains a specific statute of limitations for requesting a due process hearing. However, in Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L.Ed 2d 254(1985), the U.S. Supreme Court provided a framework to use when deciding which statute of limitations should apply to a federal cause of action that has no express limitation period. The Court directed that first it must be determined whether one limitation period should apply to all actions under the Federal Act or whether the limitation

period should vary depending on the facts of the case. Then the most appropriate [sic] statute of limitations must be determined for the federal cause of action by analyzing which state action is most analogous to the federal claim and whether the state statute of limitations governing the state action is consistent with the policies and goals of the federal act. Courts have recognized the need for the prompt resolution of educational disputes to prevent the child from falling hopelessly behind in his education.

2. The Indiana two-year limitation for personal torts appears to be applicable. IC 34-11-2-4. The Student herein is seeking recovery for an injury. A two-year time limit is appropriate and does not subordinate the goals of IDEA or Article 7 and does allow for the prompt resolution of educational disputes.
3. The applicable two years is therefore two years prior to the date the mother filed her request for the due process hearing herein (February 8, 2003) or the period commencing February 8, 2001, unless there was a continuing violation or the parents were not provided notice of their procedural rights, which would stop the running of the statute of limitations.
4. There has not been a continuing violation of IDEA or Article 7.
5. At each case conference committee meeting, the mother was provided with verbal and written notice of her rights. Although there was no notice setting forth a specific time to request a due process hearing, the notice did inform the mother that she could request a hearing. Further, all of the IEPs were agreed upon with the mother executing each but for the proposed IEP of January 29, 2003. Although not raised by the LEA, the equitable doctrine of waiver appears applicable since the mother had agreed to all of the prior IEP's. Therefore, all subsequent conclusions shall relate to and address all of the issues for the period commencing February 8, 2001.
6. The Local Educational Agency (LEA) has since February 8, 2001, provided the Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE) in compliance with 511 IAC 7-17-36 and IDEA, (as it did since January, 1998).

Under the (IDEA) and Article 7, FAPE is an educational program specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. *Board of Educ. Of LaGrange School District vs. Illinois State Board of Education*, 184 F.3d 912, 915 (7th Cir. 1999). A FAPE, however, is not necessarily the best possible education or one that maximizes the potential of each child with disabilities or one that is in some sense equal to the education provided to children without disabilities. See *D.F. vs. Western School District*, 921 F. Supp. 559, 565 (S.D. Ind., 1996), *Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. vs. Rowley*, 458 U.S. 176 (1982).

See also *Heather S. vs. Wisconsin*, 125 F.3d 1045, 1058 (7th Cir. 1997) (school district not required to provide best possible education). Review of action under the IDEA is limited to two inquiries: (1) whether the LEA has complied with the IDEA's administrative procedures; and (2) whether the IEP is reasonably calculated to provide educational benefits to the child. *Rowley*, 458 U.S. at 206-07; *Johnson vs. Duneland Sch. Corp.*, 92 F.3d 554, 557 (7th Cir. 1996). If these requirements are met, an LEA has complied with the IDEA's obligations. The LEA herein did so as concluded hereinafter.

The mother appears to argue that the LEA could not provide a FAPE because they failed to identify the Student as learning disabled or Other Health Impaired (OHI). With respect to identifying the Student as LD or OHI, the mother stated that the LEA could not address the Student's learning problems and, therefore, provide him with a FAPE, if he were not labeled LD or OHI.

From this Hearing Officer's review of the record, it does not appear that the mother and the LEA disagree concerning the Student's reading difficulties; rather, they essentially disagree on what such reading difficulties should be called. However, the Office of Special Education Programs ("OSEP"), which is charged with enforcing the regulations, has emphasized that there is no federal requirement to identify a child's handicapping condition with a label. *Letter to Presto*, EHLR 213:121 (OSEP 1988) ("There is no Federal requirement to identify a child's handicapping condition with a label... A determination of the child's needs can be made without agreeing upon a label for the handicapping condition."). See also *Heather S.*, 125 F.3d at 1055 ("The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."). Accordingly, this Hearing Officer finds the mother's argument regarding the LEA's failure to identify the Student as LD or OHI in order to provide a FAPE is unpersuasive. The Student's goals and objectives were written to meet the Student's academic needs, not based on a specific label.

7. The LEA timely and accurately identified the Student as a special needs student, specifically as emotionally disabled (ED). The Student's disabilities were due to his emotional disability and, pursuant to 511 IAC 7-26-8(a)(4) D and 511 IAC 7-26-6, the LEA properly so identified the Student as ED. Based upon the IQ, other testing scores, and his learning expectancy, he was not LD. The Student's learning problems are primarily due to his emotional disabilities.
8. The LEA accurately identified the Student's areas of special needs, specifically, his behavior and reading problems, having goals and benchmarks for each such area. The evidence presented did not show any speech, occupational or physical deficits and the speech/language, OT and PT evaluations found none.
9. The LEA since February 8, 2001 (as it did prior thereto), devised appropriate Individualized Education Programs (IEPs) for the Student, which were reasonably calculated to provide educational benefit and the Student did make educational progress, as were the prior IEP's. Under the IDEA and Article 7, an IEP must include

statements regarding the child's present level of educational performance, the student's measurable annual goals, the special education services to be provided, the extent, if any, to which the child will not participate with non-disabled children in the regular class, and the projected date for the beginning of the services and duration of those services. 20 U.S.C. § 1414(d)(1)(A); and 511 IAC 7-17-44 and 511 IAC 7-27-6.

Upon review of the Student's IEPs, it is clear that each IEP satisfied these requirements. The IEPs detailed the Student's history, present academic performance, and his social and emotional skills. The IEPs included both goals and objectives and detailed the evaluation procedures to be used. The IEPs further detailed the services to be provided to the Student and the extent to which he was able to participate in regular education programs. Finally, the IEPs included both the projected dates for initiation of services and the anticipated ending dates.

The Supreme Court has made clear that schools are required to provide personalized instruction with sufficient support services to permit the student to "benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. The Court, however, has not set out a test for determining the adequacy of educational benefits. *Id.* at 202.

Based upon the evidence, the LEA did provide a remedial reading program for the Student. The Student's kindergarten through 4th grade special education teacher of record specifically developed a reading program for the Student. The teachers were trained in the Wilson and Stephenson reading methods and used other phonetic-based reading programs. Neither Article 7 nor IDEA require school districts to employ specific educational methodologies merely because the parent prefers such method. *See E.S. vs. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998) (IDEA does not require best possible education or specific methodology requested by parent); *see also Tucker vs. Calloway County Bd. Of Educ.*, 136 F.3d 495, 505 (6th Cir. 1998) (once a court determines that Act's requirements have been met, questions of educational methodology are for resolution by the States); *Lachman vs. Illinois State Bd. Of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) (parents do not have a right to compel a school district to provide a specific program or employ a specific methodology). As long as a student is benefiting from his education, it is up to the educators to determine the appropriate methodology. *E.S.*, 135 F.3d at 569.

Further, the IEP's contained appropriate goals and benchmarks. 511 IAC 7-27-6.

Also, although the Student did not have a one-on-one aide, the evidence presented clearly established that much of the time there was either an aide or a special education teacher available to assist and support the Student when in regular education classes and in special education classes.

10. The January 29, 2003, case conference committee's recommendations for placement is a free, appropriate public education in the least restrictive environment as set forth and required under 511 IAC 7-17-36 and 511 IAC 7-27-9, and is reasonably

calculated to enable the Student to receive educational benefit. Such a placement is appropriate and necessary to provide the Student with a FAPE in the LRE.

11. The LEA placed the Student in the least restrictive environment (LRE), based upon his specific needs in compliance with 511 IAC 7-27-9. Homebound instruction was not required since the Student's absences were not due to a chronic illness under 511 IAC 7-27-11. The parent did not provide the LEA with a written statement from a physician with an unlimited license to practice medicine pursuant to 511 IAC 7-27-11(b)(1) or (2). Further, the parent agreed to all of the various placements of the child from 1998 through 2002.
12. The LEA, since required by Article 7, specifically June 21, 2000, did provide a timely and appropriate functional behavior assessment (FBA) pursuant to 511 IAC 7-17-38, and implemented an appropriate Behavior Intervention Plan (BIP) pursuant to 511 IAC 7-17-8. Nothing in Article 7 prior to June 21, 2000 required a FBA prior to the creation of a BIP. The student's BIPs or Behavior Management Plans prior to June 20, 2000, were appropriate. Further, there was no evidence presented that the Student was punished for actions or inactions that were manifestations of his disability as set forth in 511 IAC 7-29-6.
13. Based upon the evidence presented, the LEA's teachers were adequately trained in the areas of the student's needs and disabilities, in compliance with 511 IAC 7-21-2 and 511 IAC 7-20-3, with the Student's various teachers having attended various in-service training programs. The Student, since kindergarten in January, 1998, has had a TOR certified as a teacher of the learning disabled and/or emotionally disabled.
14. The LEA did offer various periodic programs in various special education matters for parents. Notices of such programs were distributed to the various special education students. The LEA complied with Article 7, specifically 511 IAC 7-20-3 and 511 IAC 7-28-1(h).
15. Although the mother testified she was unaware of such programs, the evidence clearly established the LEA did offer such training to parents.
16. The evidence presented did establish that the LEA did conduct various necessary evaluations of the Student. The parent did obtain private evaluations, which either were not contrary in their findings from the LEA's evaluations or they failed to comply with the requirements for evaluations in Article 7.
17. The record shows that ESY was considered by the various case conference committees for the Student and rejected because he had not shown either regression during school vacations or an inability to progress towards mastering his education curriculum and his IEP goals from year to year, nor was there a subsequent failure to recoup lost skills within a reasonable period of time or due to non-educational reasons. 511 IAC 7-21-3. In one of the student's IEP's, it was not checked whether ESY was needed or rejected. However, as explained by the LEA and evidenced in

the case conference notes, ESY was discussed and rejected. Although the committee should have marked whether ESY services were considered, pursuant to the provisions of Article 7, specifically, 511 IAC 7-12-1(k)(11), this procedural violation is of little consequence based upon the specific facts in this case. Further, the Student's attendance problems were hindering and negatively impacting his education.

18. The case conference committee did consider the recommendation of the parent and her experts as to the educational needs of the Student, pursuant to 511 IAC 7-27-3(e) and (f) and 511 IAC 7-27-4(c). The neuro-psychologist made various recommendations, and the majority, if not all, were incorporated in the IEP's, as were those of the neurologist.

Further, the LEA evaluated the Student in 2000 to determine whether the Student had a learning disability, which includes a reading disability. The case conference committee did not add LD as a secondary disability when questioned by the mother's advocate since the case conference committee did not believe the Student met the requirements for such determination based upon the Student's varied IQ and the Student's other evaluation scores, specifically, whether a severe discrepancy existed between the Student's academic achievement and normal or near-normal potential. 511 IAC 7-26-8.

The case conference committee's decisions are of the entire committee, not solely that of the parent or an expert. 511 IAC 7-27-4.

19. The evidence established that the LEA convened a case conference committee meeting when requested by the mother, which was the October, 2002 case conference. 511 IAC 7-27-4.
20. The Student's placement was not changed in the fall of 2002 without convening a case conference. The change was from one special education class to another special education class, which is not a change in placement. 511 IAC 7-17-13.
21. When the mother requested the Student's academic and disciplinary records, the LEA supplied these records in a timely manner. 511 IAC 7-23-1. The only alleged deficit of the LEA related to test protocols in early 2001, which are not part of the student's permanent file and if this is a procedural error, it is no harm to the student. There was no evidence presented questioning the LEA's testing procedures or the protocols used.⁴
22. The LEA properly gave the Student homework and individually worked with the Student to make up missed assignments due to his numerous absences.

⁴ Test protocols that contain personally identifiable information relative to a student are a part of the student's educational record. See 511 IAC 7-17-29.

23. Since February, 2001 the Student has neither qualified for nor needed speech therapy, occupational therapy, nor physical therapy services (nor since January, 1998). Therefore, the LEA did not inappropriately fail to offer and provide such services.
24. As of June 21, 2000, Article 7 has required that behavioral intervention plan be linked to information gathered through a functional behavioral assessment. 511 IAC 7-17-8. Prior to June 21, 2000, there was no such requirement linking such an assessment to the creation of a BIP.⁵ Pursuant to 511 IAC 7-17-38 a functional behavioral assessment is “a systematic collection and analysis of data that will vary in length and scope depending on the severity of the student’s behavior. Results and analysis of the data collection are used in developing the student’s behavioral intervention plan.” There is no requirement of a specific form or format to use in such an assessment. Further, a FBA is only required under 511 IAC 7-29-5 (a) when (1) first suspending the student for more than ten (10) cumulative instructional days in a school year; (2) placing the student in an interim alternative educational setting; (3) expelling the student; or (4) commencing a removal that constitutes a change of placement. None of these were applicable. The student’s TOR, when the student had the generic BMP, collected data and analyzed the student’s behaviors, which is clearly a FBA.
25. There was no credible evidence presented concerning the LEA’s budgetary or staffing problems. The LEA did provide an appropriate education and services, based upon the Student’s individual needs. 511 IAC 7-27-4(c) and 511 IAC 7-17-66.
26. With respect to claims such as alleged procedural errors, cases under the IDEA have adopted what is known as the “harmless error doctrine.” “[A] procedural violation of the IDEA is not a *per se* denial of FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents.” Knable *ex rel* Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir.), *cert. denied*, 533 U.S. 950 (2001). *See also* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990); Deal v. Hamilton County Dept. of Educ., 259 F.Supp. 686, 695 (E.D.Tenn. 203); White v. School Board of Henrico County, 549 S.E.2d 16, 24 (Va.App. 2001). There was no evidence presented that any purported procedural violation “compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” Roland M., 910 F.2d at 994. The Student, if he is in need of individual counseling, such counseling is NOT needed for the Student to benefit educationally from the IEP’s. Although the IEP from January 29, 1999, through January 29, 2000, lapsed, the failure to hold a case conference and develop a new IEP by January 29, 2000 was a violation of Article 7, the delay was due to the parent

⁵ This statement is not entirely accurate. Although Article 7 did not have such a specific requirement until the date noted, such a requirement did, in fact, exist prior to that date. The federal regulations, upon which Article 7 are based, specifically required this, 34 CFR § 300.520(b)(1)(i), as did the statute. See 20 U.S.C. § 1415(k)(1)(B). The LEA would have been obliged to comply with these federal requirements prior to the revision of Article 7. Notwithstanding, the record demonstrates the LEA did comply with these requirements.

twice canceling the case conferences. Further, the violation of six days is harmless. None of the procedural violations, individually or in total, harmed or deprived the Student of a FAPE.

27. As the LEA did not fail to provide a FAPE to the Student, the parent is not entitled to compensatory education for the Student, nor reimbursement for tutoring, private school, evaluations or transportation costs.

Based on the foregoing, the IHO issued the following Orders:

ORDER

Based upon the Findings of Fact and Conclusions of Law, IT IS ORDERED THAT:

1. The Student shall be placed in a class for emotionally disabled students, as proposed at the January 29, 2003, case conference, unless the mother desires to continue to home school the Student.
2. If the Student is not home schooled and attends the public school, the Student shall attend school each and every day, unless he is ill and the illness is appropriately documented in writing by a licensed physician, and such documentation is provided to the LEA in a timely fashion pursuant to the LEA's attendance policy. Further, a case conference shall be immediately scheduled to develop an appropriate IEP for the Student.

The IHO properly notified the parties of their respective administrative appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Student's Petition for Review

The Parent elected to represent the Student on administrative appeal to the Board of Special Education Appeals (BSEA). An unsigned Petition for Review with an accompanying box of documents was received on November 5, 2003, by the Legal Section, Indiana Department of Education. The Petition was lengthy but disjointed. It consisted of forty-two (42) pages, singled spaced, without counting the numerous documents that accompanied the Petition.

A Petition for Review, *inter alia*, must be "filed simultaneously with the...opposing party." The Parent did not provide the School's counsel with a copy of her Petition for Review or the accompanying documents. The Legal Section, Indiana Department of Education provided both to the School.

Pursuant to 511 IAC 7-30-4(g), “Only matters raised in the initial due process hearing may be raised in a petition for review.” The Parent appears to raise a number of issues in her Petition that were not framed, discussed, and ruled upon at the due process hearing. Accordingly, any such issues not within the framework of the due process issues are inappropriate for consideration upon administrative review and will not be addressed.

The administrative review by the BSEA is based upon the record from the due process hearing. 511 IAC 7-30-4(j). To the extent the Parent has supplied documents with her Petition for Review that were not introduced in the due process hearing below, these documents cannot be considered. The Parent did not seek leave to supply such documents as “newly discovered evidence” under I.C. 4-21.5-3-31(c). Accordingly, the documents are not part of the record and cannot be considered upon review.

A Petition for Review is required to be “specific as to the reasons for the exceptions to the independent hearing officer’s decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken.” 511 IAC 7-30-4(d)(3). The BSEA cannot guess as to a party’s intentions. The following Findings of Fact are specifically referenced by the Parent in her Petition for Review but no exception to what the IHO wrote has been posited: Findings of Fact Nos. 2, 9, 13, 16, 17, 18, 20, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52. In addition, other Findings of Fact were not noted nor were exceptions made. Because no exceptions have been made with respect to these Findings of Fact, the BSEA adopts these Findings of Fact as its own as though fully stated herein.⁶ In addition, the Parent referenced Conclusions of Law Nos. 5, 10, 11, 14, 15, 16, 19, and 25 but did not indicate any specific objections to the Conclusions of Law themselves. Accordingly, any objections are waived. The BSEA accepts these Conclusions of Law as though fully stated herein.

From a review of the Petition for Review, the BSEA identified the following exceptions raised by the Parent.

1. The IHO erred when he granted a continuance of the June 30 and July 1, 2003, hearing dates at the School’s request when the School’s counsel became ill.
2. Finding of Fact No. 6 is not supported by the record in that no document exists with a date of May 6, 1994, and no behavior problems were reported at home.
3. Finding of Fact No. 7 indicates the Student’s “Math skills were weak” during kindergarten, but the Student did not participate in Math in kindergarten.
4. Finding of Fact No. 24 does not state what the non-medical reasons for the absences were.
5. Finding of Fact No. 36 is not supported by the record.

⁶ The Petition for Review contains a number of objections to oral and written arguments made by opposing counsel or witnesses. The BSEA does not review arguments or statements made by parties.

6. The IHO did not consider all relevant testimony, to wit: Kim B., the parent of a child with disabilities (T. 402-411).
7. The IHO erred in applying a two-year statute of limitations to all claims except those claims alleging a systemic or continuing violation (Conclusions of Law Nos. 1-3).
8. Conclusion of Law No. 4 is not supported by the record.
9. Conclusion of Law No. 6 is not supported by the record. The LEA never properly identified the Student's disabling conditions.
10. Conclusions of Law Nos. 7, 8, 9, 12, 13, 17, 18, 21, 22, 23, 26 and 27 are not supported by the record.
11. Conclusions of Law Nos. 20 and 24 are contrary to law and not supported by the record.

The Parent did not specifically object to the Orders issued by the IHO.

School's Response to Petition for Review

The School, by counsel, moved for an extension of time in order to prepare and file its Response pursuant to 511 IAC 7-30-4(f). The School noted the Parent did not provide a copy of her Petition for Review to the School as required by 511 IAC 7-30-4(d)(2), nor did the Parent supply a copy of the attachments that accompanied the Petition. The Legal Section, Indiana Department of Education, provided to the School both the Petition and its attachments. The BSEA granted the School an extension of time to and including November 26, 2003, to file its Response. The written decision of the BSEA is due by December 29, 2003.

The School timely filed its Response to the Petition for Review. The School objected to the Parent's attachments in that many were not introduced during the five (5) days of hearing and were, as a consequence, not a part of the record.

The School's Response reflects the difficulty in determining which Findings of Fact and Conclusions of Law the Parent takes exception to. The School argues that, in many instances, the Parent's objections involve matters outside the record or are otherwise irrelevant to the issues as framed. The following are the School's salient points.

1. The Parent cannot complain of the order witnesses were called. This is within the purview of the party who calls the witness. In addition, no objection was made at the hearing or on the record regarding the order of witnesses.

2. The record supports the IHO's Findings of Fact that the Student did not require speech/language services.
3. The Parent's claims the Student should have been found eligible for special education and related services during the 1996-1997 school year are time-barred. The School raised the statute of limitations argument to all claims occurring prior to February 8, 2001.
4. The School did not refer the Student to the private hospital placement.
5. There is no requirement that School personnel receive specific training with respect to ADHD. All school personnel were properly licensed.
6. To the extent the Parent is raising claims regarding the Indiana Statewide Testing for Educational Progress (ISTEP), the Parent did not raise any issues at the hearing regarding ISTEP or any accommodations or modifications. The issue is waived as it wasn't raised at the hearing below.
7. The record supports the School's determination the Student did not require ESY services. His adverse academic performance was due to his poor attendance and not his disability.
8. The record demonstrates no change of placement occurred because the Student's IEP continued to be implemented.
9. The record supports the IHO's determinations that the School provides in-service training to its personnel and provides parent-training opportunities, including workshops or ADHD.
10. Evaluations conducted by the School were legally sufficient, and the determinations and inferences drawn from the results were appropriate.
11. Other than the IEP proposed in January of 2003, the Parent agreed with previous IEPs. The IHO could reasonably rely upon her signature indicating approval of previous IEPs.
12. There is no requirement the IHO specifically enumerate what "non-medical" absences of the Student occurred. The record reflects the Student had absences where no medical excuse was provided.
13. The record supports the IHO's determinations that certain disciplinary sanctions, notably the "level busting" in the Behavior Management Program, did not result in a change of placement.
14. Although the Parent asserts the IHO did not address the Student's fourth grade year, Findings of Fact Nos. 29 and 30 do address his fourth grade year.

15. The record supports the educational placement of the Student during his fifth grade year.
16. The record does not support the Parent's contention there was a breach of confidentiality when the School confirmed a referral to a local mental health organization.
17. The record supports the determination by the IHO that the student is neither LD nor OHI. His primary disability is ED.
18. There is no support in the record for the Student to have a one-to-one aide in order to benefit from his educational program.
19. The School did not delay the Parent's access to a due process hearing. The initial delay was occasioned by the Parent's letter to the Department of Education that was unclear as to what the Parent was requesting. In addition, subsequent continuances were requested by the Parent's counsel.
20. The record demonstrates the School did consider information provided by the Parent from outside sources.
21. The inclusion or omission of testimony by witnesses is within the discretion of the IHO. Not all testimony is relevant. The IHO did not err by excluding irrelevant testimony.
22. The Student was excessively absent but not for reasons related to his disability. Accordingly, the School was not obligated to provide homebound instruction during these periods of absence.
23. The Conclusions of Law are supported by the Findings of Fact, which, in turn, are supported by the record.

Parent's Response to the School's Response to the Petition for Review

The Parent, on December 10, 2003, filed a document styled as "Rebuttal to Appeal by Respondents," which has been restyled as a "Response to the School's Response to the Petition for Review" because the School has not appealed the decision of the IHO. Again, the Parent did not comply with 511 IAC 7-30-4(d)(2) by supplying a copy of this document to the School's counsel. The Legal Section, Indiana Department of Education, supplied the School's counsel with a copy of the document.

The Parent takes issue with the School's objection to the introduction of documents on administrative appeal that were not introduced during the hearing. She urges the BSEA to refer to the objected-to documents.

The Parent continues her objection to the IHO granting the School a continuance due to the hospitalization of the School's counsel, arguing that substitute counsel was available. Most of the Parent's Response is directed at the School's counsel, challenging counsel as to why counsel did not respond to the Parent's many questions in the Parent's Petition for Review.⁷

The Student was referred for hospitalization by the School, the Parent reasserts. The Parent also argues, apparently, that a teacher of a student with ADHD must be licensed in this area of disability. The Parent also argues against the application of a two-year statute of limitations. The Parent also admitted that many of the documents supplied with the Petition for Review were "intentionally left out of the Due Process Hearing."

On November 26, 2003, the BSEA notified the parties that this matter would be reviewed without oral argument and without the presence of the parties. The complete record was photocopied and supplied to the BSEA members on November 21, 2003.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On December 16, 2003, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, the Response thereto, as well as the supplemental Response by the Parent, the BSEA now decides as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

⁷ It will be noted here, and not addressed again, that a Petition for Review and its attendant arguments are for the benefit of the BSEA. The other party is not required to—or expected to—specifically address questions raised in a Petition for Review. There is no error on the School's part in declining to address questions directed at it—and not the BSEA—in the Petition for Review.

2. A Petition for Review is required to be specific as to the exceptions taken with the IHO's written decision, "identifying those portions of the findings, conclusions, and orders to which exceptions are taken." 511 IAC 7-30-4(d)(3). The Student's Petition for Review, although lengthy, is disjointed. The BSEA cannot guess as to a party's specific exceptions when these are not stated in an understandable format. In addition, a party cannot submit documents on administrative appeal that were available for submission at the due process hearing below. The Parent admits that the documents were intentionally left out of the hearing. Accordingly, the documents are not admissible on appeal and will not be considered. See 511 IAC 7-30-4(g).
3. The Parent twice failed to comply with 511 IAC 7-30-4(d)(2) by not providing a copy of her Petition for Review and her Response to the School's Response to counsel for the School. Such failures to comply could result in dismissal of the appeal. A party who is not represented by legal counsel is still required to comply with the requirements of 511 IAC 7-30-4.
4. The hearing involves issues addressing the needs of a student eligible for special education services. The parties were provided notice of their hearing rights and participated actively in the hearing process. All parties were provided due process, as contemplated by state and federal law.
5. The decision to grant a continuance at the request of a party is within the sound discretion of the IHO. Such an exercise of discretion would be reversed only where there is a showing of abuse of such discretion. In this situation, the School sought a continuance after its counsel became ill. There had already been four (4) days of testimony. The decision of the IHO to grant the School's request was both reasonable and an exercise of sound discretion. The IHO committed no error and denied no due process right to any party by doing so.
6. The IHO stated in his Finding of Fact No. 6 that a child-find screening was conducted. The record supports that this did occur as stated. The record is also replete with testimony that the student exhibited a history of behavior problems at home and at school. The IHO's Finding of Fact No. 6 is supported by the record.
7. The IHO's reference in Finding of Fact No. 7 that the Student's "math skills were weak" during his kindergarten year does not mean, as the Parent believes, that the Student was enrolled in a Math class. Kindergarten incorporates "mathematical experiences" as a part of the mandatory curriculum. See 511 IAC 6.1-5-1(a)(6). The IHO's Finding is supported by the record.
8. Although the IHO in Finding of Fact No. 24 did not indicate what the non-medical reasons were for the Student's numerous absences, the IHO was not required to. This was not particularly germane. Nevertheless, the record contains numerous instances of non-medical absences from school, including the Student's mere disinclination to attend school.

9. Finding of Fact No. 36 is supported by the record. The Student's behavior and attendance declined after the January 23, 2003, case conference committee meeting, resulting in poor academic performance.
10. An IHO does not have to credit all the testimony the IHO receives into a record. An IHO must make a determination what evidence is credible and relevant to the issues as framed. In this case, the testimony of Kim B. was mostly sparse, and what was presented was mostly objectionable hearsay. The IHO apparently did not believe this testimony was credible or relevant. The IHO's decision in this regard was warranted.
11. The IHO's decision to apply a two-year statute of limitations to claims prior to February 8, 2001, is a matter of first impression (Conclusions of Law Nos. 1-3 inclusive). The Parent noted in her Petition for Review that the federal regulations contain a limitations period to be applied to complaint investigations. See 34 CFR § 300.662(c), establishing a one-year limitation period for the investigation of complaints "unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received [by the State Educational Agency]." The federal regulations indicate that so-called "complainable" issues can be raised within a due process hearing. In fact, if the SEA has received a written request but one or more of the issues are part of a hearing, "the State must set aside any part of the complaint that is being addressed in the due process, until the conclusion of the hearing." 34 CFR § 300.661(c). The federal regulations do not indicate whether the limitations period for investigation of complaints by the SEA would apply as well to complaint issues implicated in a due process hearing. There is no question that many of the claims raised on behalf of the Student are allegations of non-compliance with federal and state regulations rather than disputes as to the appropriateness of educational services or educational placement. The IHO, to his credit, did not apply a rigid two-year limitations period based on the most analogous Indiana statute for this purpose. He recognized that there may likely be circumstances that would toll the two-year period (where "there was a continuing violation or the parents were not provided notice of their procedural rights").
Conclusion of Law No. 3. The IHO's legal analysis, including his Conclusion that application of Indiana's two-year statute of limitation found at I.C. 34-11-2-4 enhances the prompt resolution of IDEA/Art. 7 disputes regarding a child's program, is sound. The BSEA adopts his reasoning as well as his acknowledgement that there are circumstances that would toll the application of the two-year statute of limitations. The IHO permitted the introduction of the testimony that pre-dated February 8, 2001, and later determined there were no circumstances that would merit the tolling of the limitations period. This was not error.
12. The IHO determined that there were no continuing violations of IDEA or Article 7 (Conclusion of Law No. 4). The record supports the IHO's Conclusion in this regard.

13. The IHO properly noted in Conclusion of Law No. 6 that a FAPE is based upon a child's identified needs and not a particular "label." Despite the Parent's assertion that a FAPE could not be provided where the Student had not been labeled appropriately, the facts do not support her contention that this occurred in this matter. The Student is appropriately identified as having an Emotional Disability. His programming has been based on his identified needs. The IHO's Conclusion is supported by the record, as is his Conclusion of Law No. 7, finding the Student does not have a Learning Disability. In addition, the Student did not require physical therapy, occupational therapy, and speech/language therapy (Conclusion of Law No. 8).
14. The IHO's Conclusion of Law No. 9 is supported by the record. The IEPs developed for the Student were reasonably calculated to provide meaningful educational benefit to the Student.
15. Although the IHO's Conclusion of Law No. 12 contains a minor flaw in that the requirement of the School to conduct an FBA and develop a BIP for a student under certain conditions predated June 21, 2000, this is harmless error in that the School did engage in such activities. It is not necessary to use the precise terms. This would exalt semantics over reality. The School did develop a Behavior Management Plan that was sufficiently tailored to the Student's individual needs. The IHO's Conclusion of Law No. 12 is sustained.
16. The IHO's Conclusion of Law No. 17 is accurate and is supported by the record. The Student did not display regression during school vacations, a concomitant inability to recoup these losses, or an inability to progress towards mastering his educational curriculum and his IEP goals from year to year. The School did discuss the need for ESY within the case conference committee but rejected the need for such services.
17. The School, within the case conference committee, did consider input from the Parent and the Parent's experts. There is no requirement that the recommendations and input necessarily be incorporated into the Student's educational program, especially where the School disagrees with such recommendations. The IHO's Conclusion of Law No. 18 is supported by the record and by the law.
18. Conclusion of Law No. 20 is both supported by the record and by the law. Where the Student's location for implementation of his IEP changes but such a change does not affect the goals and objectives of his IEP, this is not a "change of placement" as defined at 511 IAC 7-17-13(a)(4).
19. The IHO's Conclusion of Law No. 21 regarding access to the educational records of the Student is sustained.
20. Conclusion of Law No. 22 accurately reflects the record.

21. Conclusion of Law No. 23, as noted *supra*, is appropriate. The Student was not eligible for PT, OT, and speech/language therapy services.
22. Conclusion of Law No. 24, as noted *supra* in Combined Finding of Fact and Conclusion of Law No. 15, is supported by the law, with the amended notation that the requirement preceded the promulgation of Article 7 in June of 2000.
23. An IHO does have the authority to determine that a procedural error is “harmless” such that there are no legal repercussions. A procedural violation does not translate into a *per se* denial of FAPE. There is no case law or federal guidance that supports such a scenario. Whether a procedural error constitutes a denial of FAPE is a decision to be made by the IHO, subject to administrative and judicial review for error. There is no error in this regard. The IHO’s Conclusion of Law No. 26 is sustained.
24. The IHO correctly determined in Conclusion of Law No. 27 that the School provided the Student a FAPE, thus defeating any claims for compensatory educational services or reimbursement for certain expenditures.
25. No objections are made to any Orders issued by the IHO. Accordingly, the Orders are upheld.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. The IHO’s decision is sustained, including the IHO’s Orders.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: December 16, 2003

Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-30-4(n).